No. 15022

United States
Court of Appeals
For the Ninth Circuit

P. TONKOFF, individually, and J. P. TONKOFF, as Trustee of E. J. Welch and Viola Welch, husband and wife, Roland P. Charpentier and Effie Charpentier, husband and wife, and John W. Cramer,

Appellant,

vs.

LAY BARR and BETTY BARR, husband and wife,

Appellees.

Appellees' Brief

Appeal from the United States District Court for the District of Oregon

ANDALL B. KESTER,
AGUIRE, SHIELDS, MORRISON & BAILEY,
Attorneys for Appellees.

HOUGHTON-CARSON COMPANY, PRINTERS

INDEX

TABLE OF AUTHORITIES

No. 15022

United States
Court of Appeals
For the Ninth Circuit

P. TONKOFF, individually, and J. P. TONKOFF, as Trustee of E. J. Welch and Viola Welch, husband and wife, Roland P. Charpentier and Effie Charpentier, husband and wife, and John W. Cramer,

Appellant,

vs.

AY BARR and BETTY BARR, husband and wife,

Appellees.

Appellees' Brief

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

This appeal presents purely factual questions. ppellant makes no pretense of bringing before this urt any legal ground for reversal. His sole comaint is that the trial court incorrectly decided the cts.

Appellees submit that there was ample evidence support the trial court's findings. As Judge Mcolloch said in his Memorandum of Decision (R. 37) "he case has been hard fought", and every argument which appellant now makes was strenuously

urged in the trial court. That court held in favor of the defendants, and we submit that the findings cannot be said to be "clearly erroneous".

PROPOSITIONS OF LAW

1. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Rule 52, F.R.C.P.;

U. S. v. Yellow Cab Co., 338 U.S. 338, 94 L. Ed. 150, 70 Sup. Ct. 177;

Paramount Pest Control Service v. Brewer, 177 F. (2d) 564 (9 Cir.);

Barron & Holtzoff, Federal Practice & Procedure, Vol. 2, § 1133, p. 834:

> "Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence de novo."

2. Under the test of "good and farmer-like fashion", defendants were not insurers of the success of the crop, but they were only required to exercise reasonable care under the circumstances.

Dellwo v. Edwards, 73 Or. 316, 144 P. 441;

Wells v. B. E. Porter Estate, 205 Cal. 776, 272 Pac. 1039;

Heaton v. Smith, 134 Wash. 450, 235 Pac. 958, affmd. on reh. 240 Pac. 362.

THE FACTUAL BACKGROUND

Appellant's summary of the evidence is argumentive and biased in his own favor. At this stage, at view of the evidence must be taken which is ost favorable to the party who prevailed below *Paramount Pest Control Service v. Brewer, supra,* 7 F. (2d) at 567). Accordingly it is necessary to -examine the evidence from the standpoint of the efendants. While plaintiff can complain only of atters occurring after the assignment on June 10, 953, we must review prior events in order that efendants' conduct may be judged in the light of e existing situation.

The Meiss Ranch.

The ranch which is the subject of this controversy depicted on the map which is Exhibit 2. It comrises approximately 13,000 acres of deeded land, which about 3,000 acres are reclaimed from the d lake bed (R. 60), west of the dike (R. 77). A rge part is still under water east of the dike (R. 7), and the upland around the northeast side of ıe lake is still in sagebrush (R. 78). The meadow ınd along the west and south sides is not involved, or is that part southeast of the lake. Generally peaking, the land involved in the case is in the

reclaimed portion, and on Exhibit 2 it is that marked "grain", on the west side of the dike.

Excess moisture will damage a growing grain crop, and in the old lake bed drainage is quite a problem (R. 80). A system of canals has been constructed which carries the water to a low point about in the center of the ranch, just west of the dike, from which the water is pumped over the dike, into the lake (R. 80). Thus the water level in the lake is 7 or 8 feet higher than the land west of the dike (R. 102). In a wet year there is danger of the dike breaking (R. 98) or overflowing (R. 187, 211) and soaking the grain land. In the late summer the lake may dry up altogether (R. 128).

The lake has no natural outlet, so the water becomes brackish, alkaline and unfit for irrigation after about the first of July (R. 79, 375). Around the edges of the old lake bed there is a lot of alkali in the soil, and there is a strip along the west side of the dike that never has grown anything but salt grass (R. 81-2, 338, 376). On the western side of the ranch there are about 600 acres of adobe ground, which is sticky gumbo when wet and which bakes hard when dry (R. 78, 381). The colored soil map, which is Exhibit 3, shows that according to the U. S. Soil Conservation Service there is no first-class or No. 1 soil on the entire place (R. 207-8, 340). The classifications on the Department of Interior map (Ex. 1) are not based on soil content, but only on slope and terrain (R. 341).

The ranch is situated at the foot of the mountains, an elevation of 4250 feet (R. 79), and the growing ason is uncertain, as frost damage may be ex- rienced at any time of the year (R. 87). There is timony by disinterested persons who have owned ranch that portions of the land involved in this se are not suitable for grain-raising in any event . 338, 433).

The Defendant, Clay Barr.

Clay Barr has been a farmer all his life (R. 180). was born and raised on a farm and has done st about everything there was to do around one . 180). His experience included stock, grain, and ittle irrigation (R. 180), on land in Washington, ntana, Oregon and California (R. 181). He had n the Meiss Ranch in 1948 when it was up sale, and again in 1951 (R. 181). At the times olved in this case, he was also operating a 2300 e wheat ranch in Eastern Oregon (R. 249). While was at the Meiss Ranch, the Oregon ranch was ng run with hired help (R. 193).

The Situation at the Time of Barr's Lease.

n August or September, 1952 (R. 101, 365), J. C. venson, Sr., sold the Meiss Ranch to Frank Hofues d A. G. Kirschmer, but Stevenson retained pasture hts on the entire ranch, not only on the meadow d but also on the stubble after the grain was vested (R. 62, 373). Some 800 acres in the south- st part were also subject to a lease to J. H. Noakes . 78, 101, 366, 373); and about 240 or 250 acres

in the south central part—the best part of the ranch —were leased to J. R. Ratliff and a Mr. Scarlett for potatoes (R. 82, 372, 431, 527). Both the pasture lease and the potato lease entailed prior rights to the use of the water on the ranch (R. 84, 374, 431).

Upon purchasing the ranch, Hofues and Kirschmer hired J. C. (Bud) Stevenson, Jr. to manage it for them (R. 367). After completing the 1952 harvest, they made a new, written contract with Bud for 1953, whereby Bud was to get a salary of $500 per month and expenses, plus 5% of the net profit of the crops and pasture, plus an additional sum if the property was sold (Ex. 5, R. 121, 368).

About the first of May, 1953, Hofues and Kirschmer visited the ranch and found an unsatisfactory situation (R. 369, 429). Bud Stevenson had planted about 1000 acres up to that time, but he had not done a good job of cultivating ahead of the seeding (R. 369). The seed bed was so poorly prepared that the grain drill didn't penetrate, but left the seed lying on top of the ground (R. 369-70). The planting was so poor that when the owners saw it, a workman was harrowing to try to cover up the seed (R. 369)!

As a result of this visit the owners realized that they were not going to get the ranch planted, the way it was going (R. 368), and they concluded that a change in management was necessary (R. 369). Hofues expressed their thought succinctly, when he testified that the trouble was incompetence on the part of Bud Stevenson (R. 429).

n an attempt to salvage something out of the
ıation, the owners contacted the defendant, Clay
'r, and requested him to take it over (R. 181).
'r visited the ranch about May 5, 1953, and a
se was negotiated to the Barrs for the period to
l including the crop season of 1963, for a rental
50% of the gross proceeds (Ex. 14, R. 192).

Because of the prior commitments on the ranch,
'r's lease was subject to:

(a) The lease of pasture rights to Stevenson, Sr.;

(b) The lease of 800 acres to Noakes;

(c) The lease of 240 acres for potatoes;

(d) The reservation of prior water rights for the pasture and potatoes; and

(e) The management contract with Bud Stevenson.

After making the lease on May 7th, Clay Barr
urned to his home in Oregon to make prepara-
ns to leave the other ranch, and he returned
the Meiss Ranch about May 9th or 10th, taking
'r under his lease on May 11th.

By that time there had been about 1200 acres
ded (R. 188), including the tract which later was
erred to as the "weed patch" (R. 183, 188). The
l was very wet (R. 183). The east side of the
a north of the main cross-ditch had been fall-
wed, and it was too wet to do anything with
. 184-5). Between that and the 'dobe ground
esterly) there was a field of uncut oats left over

from the prior year, which had been tramped down by grazing sheep (R. 185). The drain ditches had not been cleaned out the previous fall, so that they were choked with mud and weeds (R. 185, 188). The 'dobe ground had been seeded (all but 60 or 70 acres that was later summer-fallowed), but without any seed-bed preparation (R. 185-6). So little cultivating had been done that last year's stubble was still standing after the seeding, with the seed left lying on top of the ground (R. 186). At that time the lake was so full of water it was splashing over the top of the dike (R. 187).

4. The Period Between the Lease and the Assignment.

When Clay Barr took over, he brought down several of his own men from the Oregon ranch (R. 193), so that he had a farm crew of about ten, besides himself and Bud Stevenson (R. 194). He also brought some of his own machinery (R. 195) although that was not required under his lease (Ex. 14). Because Bud Stevenson refused to give up the ranch house, Barr was unable to bring his family down from Oregon, so Barr lived in the bunkhouse with the men, and his family stayed on the Oregon ranch throughout the 1953 season (R. 191-2, 376-7).

In that area, there was a late, wet spring in 1953 (R. 85), with rain and snow almost continuously until the middle of June (R. 194). The area described as the "weed patch" had water lying on top of the ground (R. 194). The pumps were kept going, but because the drain ditches were choked, drainage

vas very poor (R. 197). The cleaning of the ditches, vhich should have been done the previous fall, ould not be done in the spring because the heavy drag-line equipment would have mired down R. 197). In that weather, planting was impossible, nd attempts to work the fields resulted only in niring the tractors (R. 195). When it dried off the east bit, they would work day and night, using lights n the tractors at night (R. 196). By putting paddle oards on the tractors (an arrangement scoffed at y Bud Stevenson, as an old-fogey idea of his ather's) they were able to finish the planting by une 8th or 9th (R. 198-9), having lost about half heir working time during the planting season R. 198-9).

After finishing the rest, they went back and re-eeded a portion in the southwest corner that Bud ad previously sown, and which had been flooded ut (R. 199, 203). Because it was apparent that the dobe ground was not going to produce much with he inadequate cultivation that had been done, Barr efrained from seeding the last 60 or 70 acres of it, o as to concentrate on finishing the bottom land R. 202-3). Later he went back and plowed up that 0 or 70 acres for summer-fallow (R. 203).

About the 15th or 20th of May, Barr consulted vith a commercial sprayer, Lester Liston, about praying the weed patch, just west of the dike (R. 69, 203-4). At that time the grain had just begun o come up (R. 170), and there was quite a number

of weeds visible (R. 177). It was too wet and too early to spray at that time, however (R. 204). By the time the rain stopped, about ~~July~~ June 10th to 15th, the grain in the weed patch was very sick and poor, because of the alkali and flooded soil (R. 204-5). He did not try to re-seed the weed patch because by then it was too late to make a crop (R. 208).

5. The Spokane Settlement.

On June 7, 1953, with the seeding about finished, Clay Barr had to leave the Meiss Ranch to attend a trial in Spokane, Washington (R. 209). Throughout the present trial, and in his brief, plaintiff has reiterated that the Spokane case was a "fraud" action, in a not-too-subtle attempt to prejudice the court against Clay Barr. While the issues in that case have never been adjudicated, and of course are wholly irrelevant here (R. 287), reference to the pleadings (appended to the deposition of Horton Herman) will show that Clay Barr was charged with vicarious responsibility for the acts of a real estate agent. In that action the plaintiff was E. J. Welch, represented by the present plaintiff, J. P. Tonkoff, as his attorney, and defendant Barr's attorney was Horton Herman.

During the course of the trial a settlement was agreed upon whereby Clay Barr and his wife assigned their interest in the 1953 crop from the Meiss ranch, after reserving $15,000 for harvesting expenses, to Tonkoff and Herman, the two attorneys (Exhibit 5 to Herman deposition). This is the as-

gnment on which plaintiff predicates his case. onkoff and Herman then made a Declaration of rust providing for division of the proceeds of the op (up to the amount of $72,500) among various ersons interested in the litigation, including their wn attorneys' fees (Ex. 7).

Barr testified that he never at any time represented ie crop as being of any particular value or having ny particular yield, but he offered merely his in- erest in the crop, for whatever it might be worth (R. 41-3). At that time the crop had barely been planted, nd much of it was not yet sprouted, so a crop predic- on was impossible (R. 242). Plaintiff's evidence nows that he relied upon a phone call which Welch iade to Bud Stevenson and his wife, rather than pon anything Barr had said (R. 129, 142). The Barrs f course were not parties to the Declaration of Trust, o Clay had no idea how the various portions of the ssignment were determined (R. 243).

Clay Barr did make an estimate of the total mount of grain planted, which was arrived at in his manner: He had been informed that there were pproximately 3300 acres of cultivated land, out f which 200 acres were leased for potatoes, leaving 100 acres. He figured that about 150 acres had been lowed up, so he played safe by calling it 200, which would cut the total down to 2900. Then he llowed an extra 100 acres for good measure and uoted approximately 2800 acres as planted in grain R. 244). So far as he knows, no one has actually neasured the number of planted acres (R. 245).

6. The Period from the Assignment until Harvest.

After the Spokane settlement was concluded on June 10th, Clay Barr returned immediately to the Meiss Ranch (R. 209). The most pressing problem was excessive water in the lake, and in order to protect the levee and avoid flooding, they pumped water out of the lake onto the sagebrush uplands in the northeast part of the ranch (R. 210-11). For 30 days continuously, day and night, they pumped approximately 8000 gallons a minute out of the lake, until the sagebrush land was so saturated that the water was working back into the lake again (R. 212). During that time there was no lack of water on the cultivated ground (R. 212), and the crops perked up and seemed to be coming along pretty fair, with the exception of the 'dobe ground and the weed patch, which never did look good (R. 212). The bottom land had plenty of moisture all summer long (R. 213).

Along towards summer the 'dobe ground began to dry out (R. 213). However, that land had never been levelled or graded for irrigation, and the only way it could be irrigated was to pump water up on to it and just let it run off naturally (R. 200-201, 381-2). As Kirschmer testified: "The best you could do was just haphazard irrigation, hit here and miss there" (R. 382). As an owner, he had never contemplated irrigating there (R. 382), and the necessary preparation for irrigation was "not a tenant's job anyway" (R. 381). Stevenson, Sr. had told Kirschmer that irrigation wasn't necessary (R. 382).

The 'dobe ground of course was higher than the adjacent bottom land, and putting water on the dobe ground (where the crop was poor anyway because of inadequate cultivation before seeding) involved the danger that some of it would run down onto the ripening grain on the bottom land (where the best crop was).

It is undisputed that the important thing was to keep water off the grain on the good bottom land. Stevenson, Sr. admitted that if water had been allowed on the bottom land during the summer, it would have started a second-growth, which would have delayed harvest so that the entire crop might have been lost because of frost or fall rains (R. 86-7). When Barr sought Stevenson's advice about irrigating, Stevenson warned Barr against letting any water get on the bottom land (R. 199-200).

About June 20th, Barr returned to Oregon to make preparations for the harvest on the Oregon ranch (R. 210). He left one of his own men, Jeff Williams, on the Meiss Ranch (R. 217), and of course Bud Stevenson was there as manager (R. 106). Before leaving, Barr requested Bud to work on cleaning out the ditches and starting some irrigating, saying that he, Barr, would be back later with another man to help (R. 217).

About July 1st Welch, who had been at the Meiss ranch, reported to Tonkoff that the grain was dry (R. 143-4), so arrangements were made for Tonkoff, Welch and Barr to fly down in Tonkoff's private

plane to inspect it (R. 213-4). Tonkoff and Barr drove out into the fields along the west side, stopped in different places and kicked down into the soil a couple of inches. Although it was dry on top, there was moisture underneath, and Tonkoff remarked that "it didn't look too bad" (R. 215). They went up onto the 'dobe ground and discussed the landlord's restrictions on Barr's use of the water and the problem of trying to irrigate without getting water down on the bottom land (R. 215). When Tonkoff urged Barr to irrigate, Barr agreed to try a little of it, but he wouldn't guarantee to irrigate the 'dobe land (R. 216). Barr's testimony of the following colloquy is undisputed:

> "And I says, 'What's more,' I says, 'if you and Mr. Welch and the rest of them are interested in this—or dissatisfied in the way I am operating this place, give me the expenses I am out from June 10th on and you take it over.' He says, 'No, no. You are doing fine. We don't want nothing to do with it.'
>
> "Q. That was Tonkoff that said that?
>
> "A. That is Tonkoff that said that." (R. 216).

While Barr was at the Meiss Ranch about July 1st, he called the commercial sprayer, Liston, to come out again and look at the weed patch (R. 170). Liston came out about July 2nd or 3rd, and at that time the weeds were so bad and the grain was so poor that a heavy enough spray to kill the weeds would also have killed the grain (R. 171, 204). Barr testified that because of the wet start and the alkali soil, the

weeds in that area were always ahead of the grain, and there was no time that season when the grain in the weed patch was strong enough to withstand the dosage of spray that would have been necessary to kill the weeds (R. 205). In passing, it may be noted that Stevenson, Sr. never did any spraying on the ranch (R. 80), although he told Barr that the same patch had gone to weeds the last two years he had the place (R. 201). Barr did have some spraying done (R. 171-2).

Sometime after July 2nd or 3rd, Barr returned to Oregon, and then brought another workman, Perry Morter, back with him to the Meiss Ranch about July 12th to 15th (R. 217). At that time they inspected the irrigating that Bud Stevenson and Jeff Williams had done, and found that the water was running off the 'dobe ground, down into the bottom land (R. 218). They concluded to try moving the water more often, not leaving it so long in one place, and Barr left Morter in charge, with instructions to call him (R. 218-9). Morter called the next day and said they couldn't move the water fast enough to keep it out of the bottom land, so Barr told him to shut it off (R. 219).

During the summer various spots that were not producing good grain crops were plowed up, for summer-fallow and to keep the weeds down. These included about 100 acres in the "weed patch" (R. 220), about 60 to 70 acres of alfalfa in the 'dobe ground (R. 221), and some alkali land on the north

side that had not been seeded (R. 221). Since the crop on those spots was poor anyway, there was no loss of grain production by plowing them up (R. 90-1), and even Stevenson, Sr. did not criticize Barr for the plowing (R. 92).

The relationship between Barr and Bud Stevenson during the summer did not prove satisfactory (R. 219). Bud still regarded himself as the manager (R. 122), but he resented the fact that Barr's lease would deprive him of a job for the following years (R. 219-20). He did not cooperate with Barr except for the single job of cleaning out some ditches and starting the pumps so that Williams could irrigate in the latter part of June (R. 217-20).

7. Harvest Time.

Clay Barr finished the harvest on the Oregon ranch around August 7th, and he went directly to the Meiss ranch (R. 223). He brought three of his own men who were experienced operators (R. 229), and additional harvesting equipment, and he also rented extra equipment (R. 223). All of the harvesters on the place were of the pull-type, which would have wasted grain if operated alone, so he provided two self-propelled combines to open up the fields ahead of the others (R. 223-4).

Barr had given the ten days' notice of the commencement of harvest, as required by the assignment, stating that harvest would begin on or about the first of September (R. 222, Ex. 8), but the grain was not ready to harvest at that time, and it was

eptember 8th before the grain was ripe enough
) they could actually begin (R. 224). Even that
roved to be early, and some of the grain had to
e "double-handled" and stored for a while to dry
ut, before it could be loaded into box cars (R. 227).

The harvesting started with the fields which
pened first, and it moved steadily along with six
ombines going (R. 227-9). There is a sharp conflict
i the evidence as to whether there was any exces-
ve waste of grain in the fields. Witnesses who
stified that there was no undue waste were: Clay
arr (R. 229-230, 248), Lonard Flint (R. 302), Perry
lorter (R. 313), Harold Morter (R. 326), Warren
arnam (R. 336-7), A. G. Kirschmer (R. 384).

There is also a conflict as to the amount of grain
oilled along the road while hauling into town. One
f the trucks "had his endgate jiggle loose" on the
ough road, and he lost a quarter or a third of one
oad (R. 236-7). Other than that, there is substan-
al testimony that there was no abnormal or undue
oillage of grain along the road, e.g.: Clay Barr (R.
7), Ralph Smith (R. 293-4), Perry Morter (R. 313),
Harold Morter (R. 326), A. G. Kirschmer (R. 384-5).

There were no public grain elevators within a
ong distance, so it was necessary to sell the grain
romptly and load directly into box cars (R. 239).
The Barrs had nothing to do with the sale of the
rop, as Bud Stevenson contracted for the sale of
ne owner's half interest, and Welch contracted for
ne half interest assigned by Barr to Tonkoff and

Herman (Ex. 4, R. 119-20, 240, 388). Barr was not consulted about the sale, and never saw an accounting for it until the time of trial (R. 159, 240).

Before the harvest started, the Barrs sold their interest under the lease to the Farnam brothers to take effect October 1st, or as soon as the 1953 crop was completed (R. 225-6). To get the owner's consent, Clay Barr had to make a trip to Denver on the 5th of September, and he was back on September 9th, at the beginning of harvest (R. 226). Around October 5th, when the bulk of the harvest was completed, Barr returned to Oregon, and he moved out completely from the Meiss Ranch on October 19th (R. 239).

Between September 9th and October 5th, Clay Barr was on the Meiss Ranch continuously, personally supervising the harvesting every day (R. 229-31). When he left on October 5th all the harvesting was done except the weed patch, which was left to the last because there was the least grain there (R. 231). Because the crop was so poor on that patch, the expense of harvesting was greater than any possible return, and if it had been his own crop, he would not have attempted to harvest the weed patch at all (R. 231). But because it wasn't his crop he made "an extreme effort to get everything that was humanly possible" by harvesting all that there was (R. 231). The Barrs' expenses of harvesting exceeded $16,000.00, when the assignment had reserved them only $15,000.00 for that purpose (R. 234-5).

ANSWERS TO SPECIFICATIONS OF ERROR

1.

The Bud Stevenson Management Contract

Appellant challenges the finding that the management contract remained in effect throughout the 1953 harvest season. His objection is not to the truth of the finding, which cannot be disputed, but because he doesn't like the "implications and inferences that might be drawn therefrom" (Appellant's Brief, p. 29). This is hardly a basis for attack upon a finding, the purpose of which is merely to state the fact, and let the inferences fall where they will.

That the finding is true, and the management contract did remain in effect, is attested by Bud Stevenson (R. 105-6, 121-2), by Kirschmer (R. 377), by Clay Barr (R. 189-192, 265-6), and by the written agreement itself (Ex. 5). If that were not true, why was Bud staying on the place? And by what authority did Bud dispose of the owner's half-interest in the crop?

The fact is material, in that it helps to refute plaintiff's allegation that defendants Barr "sold all of the crops" (Complaint, Par. 9, R. 7), when the crops were in fact sold by Stevenson and Welch. It also helps to explain the difficulties under which Clay Barr was working that summer, in the face of personal animosity, divided responsibility, conflicting advice, and without even housing for his family!

II.

The Warranty of Acreage

(Specifications II and III).

The warranty in question says only that *approximately* 2800 acres are planted to crop. Clay Barr's method of computing the acreage was detailed above (R. 244), and it is just as good an estimate as that of anyone else. The exact number of acres has not been measured by anyone, and in view of the varying estimates the trial court was entitled to accept Barr's as correct. Even if the actual number of acres was 2500, 2600 or 2668, the variation would be within the latitude allowed by the word "approximately".

III.

Farming in a Good and Farmer-Like Fashion

(Specifications IV through IX).

We deem it unnecessary to comment in detail upon all of plaintiff's reckless and scurrilous charges, as the only question here is whether there is evidence to support the trial court's findings that defendants Barr "did not fail, refuse or neglect to farm the Meiss ranch in a good and farmer-like manner" and "did not breach or fail to perform any covenant, provision or condition of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement". We will limit our discussion to the allegations of negligence in the complaint, and in that order (R. 5-6).

(a) *Spraying for Weeds.*

Despite the attempt of plaintiff to make it appear that the weeds "simply took over" (Appellant's Br., p. 38), there is substantial evidence that the only place on the ranch where weeds were any problem was the area referred to as the "weed patch" (R. 246). This was in the southeast part, west of the lake, where the early flooding and the high alkaline content of the soil combined to give the weeds a head start over the grain. No one denies that the weeds there were bad and the grain was poor, but it was not through any fault of Clay Barr. It was one of those circumstances inherent in farming. There is evidence that because of the relative strength of the weeds and grain, there was no time during the growing season that the weeds could have been sprayed effectively without also killing the grain (R. 246-7). It is significant that Stevenson, Sr. told Barr that the same piece had gone to weeds the last two years he had it (R. 201), and the Farnams were unable to raise a crop on it in the next two years after Barr left (R. 338).

(b) *Irrigation.*

With customary exaggeration plaintiff tries to make it appear that the entire crop was burning up (Appellant's Br., p. 43). In fact, there was ample moisture all during the summer in the bottom land (R. 213), and the only area that showed any lack of water was the 'dobe ground and a strip west of the potato field (R. 247). The area west of the potato

field was in fact irrigated by Barr's man (R. 218). The 'dobe ground could not beeffectively irrigated because it had never been prepared by grading and levelling (R. 200-1, 381-2), and the danger of having water run off onto the bottom land outweighed any chance of improving the crop on the 'dobe ground. It is apparent that the actual reason for the poor crop on the 'dobe ground was the failure of Bud Stevenson to cultivate it properly before seeding. If he had prepared a good seed bed, with a mulch on top, it wouldn't have cracked and it would have conserved the natural moisture (R. 271-8), so as to make a crop without irrigation, as the owners intended (R. 382).

(c) *Plowing Under 120 Acres of Oats.*

The area involved in this charge was in the weed patch, which Barr plowed up because the grain was thin and the weeds were bad (R. 247-8). Plaintiff concedes that "it undoubtedly would be good practice to plow up a patch of weeds" (Appellant's Br., p. 45), and his argument that the weeds were bad because of failure to spray has already been refuted. His argument that the oats were thin because of failure to irrigate blithely ignores the evidence that the oats in the weed patch were suffering not from too little water, but from too much! There was no lack of water in the bottom land, near the dike, where the weed patch was located (R. 213). The trial court could well have agreed with Barr that the only mistake was in not plowing more of

he weed patch under (R. 248).

(d) *Wasting of Grain in the Fields*
and
(e) *Spillage of Grain on the Road.*

On both these points we have previously referred o the conflict in testimony (Supra, p. 12), and the onflict has been resolved in favor of the defendnts. The accident which caused a portion of one oad to be spilled on the road is certainly not sufficient to support a charge of negligent husbandry. The trial court was entitled to believe the many witnesses who testified that there was no undue waste, even if, as plaintiff argues (Br. p. 49), some of them were relatives of Barr.

IV.

Plaintiff's Prayer for Judgment
(Specification X).

Plaintiff presents nothing new under this point nd merely reiterates that the crop should have roduced more. In fact, there is ample evidence that he crop was good except in two areas: the weed atch and the 'dobe ground (R. 378-381). The reasons for the poor crop in those areas have been discussed above, and there is certainly sufficient evidence to support a finding that the fault was not n Clay Barr's management. The testimony of Kirschmer, one of the owners and himself an experienced farmer, should carry great weight:

"A. The primary difficulty was—as I see it, the primary difficulty started with the poor job

of seeding the first one thousand acres, and secondly, three weeks of cold wet weather. After that sprouted it just laid there and the weeds grew and the grain didn't grow. That is as I see it. And the wheat and the barley and the rye and the oats seemingly got in a weakened condition, and too there was some alkali in that grain; after the ground stood cold so long and wet so long the alkali came out, and I believe that was the primary reason why that seven hundred acre field didn't do no good, because the grain had come up pretty good at one time, but not too good, but it come up to a fair stand; and then when fall come there wasn't no grain there; it just dried out, that is what I am going by.

"Q. You feel that it was the excessive dampness and alkali?

"A. A cold, damp spring let the alkali do too much work before the grain got to going." (R. 385-6).

With respect to irrigation, Kirschmer testified:

"A. This land that they talked of irrigating isn't land that you can—it wasn't prepared for irrigation. Stevenson never irrigated it and it never was prepared for proper irrigation. You could irrigate it, but you know water, how water is, it runs around here and there and everywhere; you could have probably helped it some by irrigating, but you wouldn't have ever got a job. In order to get a job irrigating, you have got to put a float on that land and float it and prepare it so that when you put water on it it will spread, and that wasn't done; there was no time for it." (R. 410-11).

nd again:

"A. It wasn't prepared sufficiently to do a volume job of irrigating, or a good job of irrigating; it would just be kind of a half irrigating job. It was somewhat on the discouraging order to try to do it. You could go at it and get some water on it, but it wouldn't make any money. It would just be kinda of a half way irrigating job, something on a discouraging order to try to do it. You could go at it and get some water on it, but it just wouldn't make, it wouldn't make any money. I tell you, it just wasn't set to irrigate that kind of a acreage, wasn't prepared.

"Q. Suppose they had wanted to irrigate it, was there water available with which to irrigate it?

"A. All they could have done was with lake water, and, of course, at that time, it was of questionable merit.

"Q. In other words, the only water available was the lake water, and the lake water was so full of alkali that it couldn't be used, and there wasn't anything to irrigate it with?

"A. Well, of course, I wasn't there to check the water, but that is the report we get on the water. By mid-season it gets so heavily alkalied that it isn't good practice to use it. The Soil Conservation and even the AAA Office have recommended not to use it.

"That wasn't the big objection; the big objection is the lack of preparation for irrigation, lack of arrangement. Nobody had ever irrigated

and nobody had ever prepared it to irrigate, and it was just a haphazard operation, the best you could have made of it. There was no pump there to pump any quantity of water. They could have pumped some water, sure.

"Q. Has that been irrigated since then?

"A. No, the boys didn't irrigate it.

"Q. And during the eight years that Jim Stevenson had operated it, he hadn't irrigated it either?

"A. There was no preparation made for irrigating. You could have irrigated a few acres, of course.

"I am giving you my opinion, my exact opinion of the thing. I feel just like I am talking. I irrigate enough here to know what it takes to irrigate. You have got to be prepared to irrigate." (R. 419-20).

Kirschmer's overall-conclusion is significant:

"Q. From your standpoint as an owner of the ranch and having an interest in the crop, is there anything wrong with the operation of Mr. Barr in managing the ranch for that year?

"A. Yes, it wasn't his fault; he got there too late. If he would have started March 1st, I would have been critical on the operation, but being as he started as late as he did, I am not critical.

"Q. Did you feel that he did the best that he could under the circumstances?

"A. Under the circumstances, getting started late and wet weather hitting him, there was just nothing anybody could do." (R. 391-2).

CONCLUSION

Implicit in appellant's brief is the contention that farming is an exact science. With naive simplicity he argues that because a piece of ground produced a record crop in 1947 (when much of the land was still virgin), therefore it should have produced a similar crop in 1953, and its failure to do so must have been the result of negligent management.

Anyone who has had anything to do with it knows that farming is one of the biggest gambles there is (R. 277). The most serious factors—the weather and the market—are ones over which the farmer has no control. And others—e.g. weeds, insects, soil and water conditions, etc.—are subject to only limited control. In attempting to cope with the forces of nature, the farmer is faced with innumerable questions requiring the exercise of judgment in the light of particular circumstances.

With the benefit of hindsight, when all uncertainties have been resolved, it is easy to say that some other course of conduct might have produced a better crop. But it is quite a different thing to have the responsibility of making a vital decision on the ground. Recall, for instance, that plaintiff Tonkoff, who is now so eager to criticize, refused to accept any responsibility when Barr offered to step out and let Tonkoff and the others take it over. "No, no," said Tonkoff, "You are doing fine, we don't want nothing to do with it." (R. 216).

Appellant asked the trial court to "second-guess" the defendants' farming practices; and failing in that, he now asks this court to "second-guess" the trial court, without the benefit of seeing and hearing the witnesses. Experienced farmers expressed sharply differing views as to what was good or bad farming under the peculiar situation in which Barr found himself. Surely this is not the kind of a case for an appellate court to try *de novo* on the cold record.

Clay Barr stepped into a bad situation in an attempt to help the owners salvage something out of what was otherwise a lost season. When he took over, nearly half the crop had been sown by an incompetent manager, without adequate cultivation. The drain ditches, which are vital to that kind of operation, were clogged, and it was impossible to clean them in time to carry off the spring rains. His late start, combined with a cold, wet spring, set the whole season back, so that at harvest time they were fighting against the chance of fall rains that would destroy the entire crop. The two areas which did not produce—the alkali weed patch and the gumbo 'dobe ground—did not have good soil conditions for grain anyway. He was faced with prior leases on some of the land, prior commitments on the water, a contract with an unfriendly manager, and didn't even have housing for his family. Under the circumstances we submit that Clay Barr did well to salvage as much as he did.

Far from being indifferent to the operation, Barr went beyond the call of duty. He brought in his own equipment, when that was not required under his lease. He expended his own money in the harvest, above the amount reserved to him for that purpose. He harvested what grain was in the weed patch, when if it had been his own he would have let it go. He even brought his own mother down to cook for the harvest crew.

As Judge McColloch said in his memorandum decision: "Land-owner Kirschmer exonerates defendant and I do the same."

Respectfully submitted,

RANDALL B. KESTER,

MAGUIRE, SHIELDS, MORRISON & BAILEY,

Attorneys for Appellees.